PACIFIC ASIA LEASING (M) SDN. BHD.

v.

SENANTI MOTORS SDN. BHD. & ANOR.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL SUIT NO. C-23-1587-86]
22 JUNE 1992

CIVIL PROCEDURE: *Striking out - No reasonable cause of action - Guarantor commencing third party proceeding against co-guarantor for contribution or indemnity before settling debts due to plaintiff - Rules of the High Court 1980, O. 16 r. 1(1)(a), (c), r. 4(2), O. 18 r. 19(1).*

CIVIL PROCEDURE: *Third party proceeding - Application to set aside - Premature application - Rules of the High Court 1980, O. 16 r. 4(2).*

CIVIL PROCEDURE: *Waiver - Validity of third party notice - Consent order on summons for direction - Whether any reasonable cause of action where guarantor commencing third party proceeding against co-guarantor for contribution or indemnity before settling debt due to plaintiff.*

The plaintiff had entered into an equipment lease agreement with the first defendant in respect of a bulldozer. Both the second defendant and the third party were directors to the first defendant and both of them had signed a guarantee and indemnity in respect of the agreement. The third party was also a director of the plaintiff at all material times.

Plaintiff alleged that the first defendant defaulted and so it had terminated the said agreement, repossessed and sold the bulldozer and brought this action, *inter alia*, for total amount of the unpaid rentals for the entire duration of the agreement.

The second defendant issued third party notice. Third party entered an appearance on 30 April 1987. On 7 May 1987, the third party filed a summon-in-chambers seeking firstly to set aside the third party notice pursuant to O. 16 r. 4(2) and secondly to strike out a purported statement of claim dated 24 April 1987 for disclosing no reasonable cause of action pursuant to O. 18 r. 19(1).

On 3 July 1987, the Senior Assistant Registrar made an order by consent of the parties that the second defendant serve his statement of claim on the third party within 14 days but the third party do file his defence "within 14 days from the date the Court decides the summons-in-chambers filed on 7 May 1987 to set aside the third party notice".

Held:

[1] The document dated 24 April 1987 was not a statement of claim. It was in fact the third party notice. The Rules of the High Court 1980 require the use of Form 22 which requires the defendant to state the grounds of the claim. Therefore the description used is a misnomer.

[2] By consenting to the order or the summons for directions, the third party's solicitor acquiesced in the validity of the third party notice.

[3] Order 16 r. 1(1)(a) of the RHC 1980 does not impose a precondition that the defendant must establish that this cause of action for a contribution should already have occurred at the time he takes out his third party notice.

[4] The second defendant was claiming a contribution in the event that the Court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallised at that point and the mutual obligation of the parties should be resolved immediately at that stage.

[5] The second defendant is entitled to enforce his potential right to contribution even before he has paid anything. He can obtain a prospective order directing the co-surety on payment of his own share to indemnify him against any further liability.

[6] Since plaintiff, the principal creditor is a party to these proceedings, the second defendant can even apply for an order directing the third party to pay his share directly to the plaintiff.

[Third party's application dismissed. Costs to be taxed and paid by third party to second defendant.]

Cases referred to:
Bank Bumiputra Malaysia Berhad v. Darnaz Enterprise Sdn. Bhd. & Ors. [1986] 2 MLJ 223 ***(cit)***
Wolmerhausen v. Gullick [1893] 2 Ch 514 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 16 r. 1(1)(a), (c), r. 4(2), O. 18 r. 19(1)
Supreme Court Practice 1979 [UK], O. 16

Other sources referred to:
Chitty on Contracts, 25th Edn., Specific Contracts, para. 4462
Halsbury's Laws of England, 4th Edn., Vol. 20, para. 315
Atkins Court Forms 2nd Edn., Vol. 37 (1981 issue) pp. 299, 302

For the plaintiff - Vykneswary; M/s. A.J. Ariffin, Chong & Harpal
For the defendant - Jagjit Singh Gill; M/s. Gill & Co.
For the third party - Abdul Ghani; M/s. Abdul Ghani & Co.

JUDGMENT

Mahadev Shankar J:

This is an application to set aside a third party notice and to strike out a purported statement of claim filed by the 2nd defendant against the third party.

The plaintiff (Pacific) entered into an equipment lease agreement (the said agreement) with the first defendant (Senanti) in respect of a bulldozer.

At the time the second defendant was a director of Senanti. So was the third party. Both of them signed a guarantee and indemnity annexed to the said agreement for its due performance.

The third party was also a director of Pacific at all material times.

Pacific alleges that Senanti defaulted. So it terminated the said agreement repossessed and sold the bulldozer, and brought this action, *inter alia,* for the total amount of the unpaid rentals for the entire duration of the said agreement. Summary judgment was given in the first instance by the Senior Assistant Registrar. The defendants appealed. I set aside that judgment and gave unconditional leave to defend. My reasons are already set out in a previous judgment.

The second defendant issued third party notice after service of the writ of summons and the statement of claim.

Order 16 r. 4(2) of the Rules of the High Court permits a third party who has been served with a third party notice to make an application to set it aside if seven days *after* he has entered an appearance, the defendant has failed to take out a third party summons for directions. Appearance was entered on 30 April 1987. The application to set aside was filed on 7 May 1987, before seven clear days had expired.

So it was premature. On 8 May 1987, the summons for directions was applied for. On 3 July 1987, a consent order was made by the Senior Assistant Registrar on this summons that the second defendant serve his statement of claim on the 3rd party within fourteen days but the third party do file his defence, "within 14 days from the date the Court decides the summons in chambers filed on 7 May 1987 to set aside the third party notice".

The summons in chambers had two prayers. The first was pursuant to O. 16 r. 4(2). The second prayer was to strike out a "statement of claim" dated 24 April 1987 on the grounds set out in O. 18 r. 19(1) the chief of which is that it disclosed no reasonable cause of action.

Having had the benefit of further arguments I would observe as follows.

The document dated 24 April 1987 was not a statement of claim. It was in fact the third party notice. The rules require the use of Form 22 which requires the defendant to state **the grounds of the claim**. The third party's solicitors description of the grounds in the notice as a "statement of claim" is a misnomer.

By consenting to the order on the summons for direction the third party's solicitors acquiesced in the validity of the third party notice. A formal statement of claim was delivered on 11 July 1987, pursuant to the order for directions.

But to put an end to any further doubts as to the merits I propose to treat the third party's objections under O. 18 r. 19 as being related to this statement of claim which is in very similar terms to the grounds referred to earlier.

In the third party's affidavit (encl. 21), he admits he is a co-guarantor; but he says it is Pacific's prerogative to sue a guarantor of its choice. In para. 3 of his affidavit he avers that for the purpose of these proceedings he could not be made liable under the guarantee. The only reason given is that in law the second defendant is not entitled to make him a third party as an indemnifier or contributor for the reason that the right to contribution "will only arise after the second defendant has first fully settled all outstanding debts due to the plaintiff which he has not done so, to my knowledge".

The case upon which his solicitors rely is *Bank Bumiputra Malaysia Berhad v. Darnaz Enterprise Sdn. Bhd. & Ors.* [1986] 2 MLJ 223 where the following passage appears at p. 224.

> The 2nd third party's co-sureties, that is, the second to the fifth defendants, also do not have a cause of action against him because they have not each paid anything to the creditor. A surety is not entitled to call upon his co-surety for contribution until he has paid more than his portion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor (*Re Snowdon, ex parte Snowdon*).

The suggestion is that a surety is therefore not entitled to commence third party proceedings against his co-surety until he has first paid more than his portion of the debt due to the principal creditor. With respect I am unable to agree.

The terms of O. 16 r. 1(1)(a) in so many words apply to a defendant who "claims ... any contribution". I do not read these words as importing a precondition that the defendant must establish that his cause of action for a contribution should already have accrued at the time he takes out his third party notice. The second defendant here was claiming a contribution in the event that the Court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallised at that point and the mutual obligations of the parties should be resolved immediately at that stage.

To put it another way the surety in my view is entitled to enforce his potential right to contribution even before he has paid anything. He can obtain a prospective order directing the co-surety on payment of his own share to indemnify him against any further liability and since Pacific the principal creditor is a party to these proceedings, the second defendant can even apply for an order directing the third party to pay his share directly to the plaintiff. Authority for these statements can be found in *Chitty on Contracts* (25th Edn.), (Specific Contracts) at para. 4462.

As to a surety's right to an indemnity against a principal debtor there is a specific reference to third party procedure in para. 4455. The procedural implications are the same. *Ex parte Snowdon* is not referred to in the Supreme Court Practice 1979 under O. 16. Had *Wolmerhausen v. Gullick* [1893] 2 Ch. 514 been brought to the attention of High Court in the case just referred to, the decision may well have been different.

Furthermore the provisions of O. 16 r. 1(1)(c) are very wide. I agree with Counsel for the 2nd defendant that the passages he cited from *Halsbury's Law of England* (4th Edn.), Vol. 20 para. 315, and *Atkins Court Forms* (2nd Edn.), Vol. 37 (1981 issue) at p. 229 and 302 are very relevant.

In all the circumstances I dismiss the third party's application (encl. 22) with costs to be taxed and paid by the third party to the second defendant. I further direct that he do file his defence to the second defendant's statement of claim within 14 days from today as previously ordered by consent.

Also found at [1992] 3 CLJ 1621